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SUPREME COURT, U.S.
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No. 01-620

In the Supreme Court of the United States

BUILDING INDUSTRY ASSOCIATION OF SUPERIOR CALIFORNIA, ET AL., PETITIONERS

v.

GALE NORTON, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1 Whether the decision of the United States Fish and Wildlife Service (FWS) to list four species of fairy shrimp as endangered or threatened, pursuant to Section 4 of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1533, was a permissible exercise of federal authority under the Commerce Clause.

2. Whether, in deciding whether to list species as threatened or endangered pursuant to the ESA, the FWS may rely on scientific studies received during the comment period for a proposed listing without publishing the new studies for public comment, where the conclusions of those studies confirm the findings on which the agency's listing proposal was based.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B10) is reported at 247 F.3d 1241. The opinion of the district court (Pet. App. C1-C31) is reported at 979 F. Supp. 893.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 2001. A petition for rehearing en banc was denied on July 31, 2001 (Pet. App. A1). The petition for a writ of certiorari was filed on October 11, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Endangered Species Act of 1973 (ESA or Act), 16 U.S.C. 1531 *et seq.*, mandates protection and conservation measures for species of fish and wildlife determined to be endangered or threatened. The Act reflects Congress's recognition that threats to species "may arise from a variety of sources; principally pollution, destruction of habitat and the pressures of trade." H.R. Rep. No. 412, 93d Cong., 1st Sess. 2 (1973) (House Report). The House Report explained that "protection of endangered species is not a matter that can be handled in the absence of coherent national and international policies: the results of a series of unconnected and disorganized policies and programs by various states might well be confusion compounded." *Id.* at 7. Accordingly, while States were given the option of entering into cooperative agreements to administer their own programs for endangered species conservation, see 16 U.S.C. 1535(c)-(e), the Secretaries of the Interior and Commerce were given the primary responsibility for administering the protections of the Act.

Administration of the ESA is divided between the Fish and Wildlife Service (FWS) in the Department of the Interior and the National Marine Fisheries Service (NMFS) in the Department of Commerce, depending on the species in question. See 16 U.S.C. 1532(15); 50 C.F.R. 402.01(b). Under Section 4(a) of the Act, 16 U.S.C. 1533(a), the relevant Secretary determines whether to list a species as "endangered" or "threatened," based on factors that include the "present or threatened destruction, modification, or curtailment of its habitat or range," as well as evidence of "overutilization for commercial, recreational, scientific, or

educational purposes." 16 U.S.C. 1533(a)(1)(A) and (B).[1] Any interested person may petition the appropriate Secretary to add a species to the list of "endangered" or "threatened" species. 16 U.S.C. 1533(b)(3). If the Secretary finds that the petition "presents substantial scientific or commercial information indicating that the petitioned action may be warranted," he "shall promptly commence a review of the status of the species concerned." 16 U.S.C. 1533(b)(3)(A). Listings are made by regulations promulgated pursuant to the rulemaking requirements of the Administrative Procedure Act (APA) and the additional requirements set out in Section 4(b)(5) and (6) of the ESA, 16 U.S.C. 1533(b)(5) and (6).

Section 7(a)(2) of the ESA, 16 U.S.C. 1536(a)(2), requires all federal agencies to "insure" that their actions are "not likely to jeopardize the continued existence of any endangered species or threatened species." Section 9(a)(1) of the Act, 16 U.S.C. 1538(a)(1), prohibits takings of endangered species by all persons who do not have a permit or other authorization. Under the ESA, the term "take" is defined to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. 1532(19); see also 50 C.F.R. 17.3 (definition of "harass"); *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995) (upholding regulation defining "harm" for purposes of "take" prohibition).

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[1] An endangered species is one that is in danger of extinction throughout all or a significant portion of its range. 16 U.S.C. 1532(6). A threatened species is one that is likely to become endangered within the foreseeable future throughout all or a significant portion of its range. 16 U.S.C. 1532(20).

2. In November 1990, Ms. Roxanne Bittman petitioned FWS to list the Conservancy fairy shrimp, longhorn fairy shrimp, vernal pool fairy shrimp, and California linderiella as endangered species. Pet. App. C6. In April 1991, Ms. Dee Warenycia petitioned FWS to list the vernal pool tadpole shrimp as an endangered species. *Ibid.* On May 8, 1992, FWS published a proposed rule to list the five species as endangered. *Ibid.*; see *id.* at B2; 57 Fed. Reg. 19,856 (1992). The proposed rule reflected the agency's findings that all five species live only in vernal or seasonal pools and swales and are ecologically dependent on the seasonal characteristics of their habitat. *Id.* at 19,857-19,858. The proposed rule emphasized the adverse impact on the species' habitat of human activities such as urban development, water supply, and flood control activities, which threaten the species' viability by destroying individual vernal pools and through direct and indirect effects on remaining pools resulting from modification of the surrounding uplands. *Id.* at 19,858-19,860. The proposed rule also cited the failure of existing regulatory mechanisms to protect the species as a reason for the proposed listing. *Id.* at 19,860-19,861.

On September 19, 1994, after receiving comments from a variety of sources, FWS published a final rule listing three of the species—the Conservancy fairy shrimp, the longhorn fairy shrimp, and the vernal pool tadpole shrimp—as endangered and the vernal pool fairy shrimp as threatened. 59 Fed. Reg. 48,136 (1994); see Pet. App. B3, C6. The proposal to list the California linderiella was withdrawn. 59 Fed. Reg. at 48,154. The agency "based its determination primarily on the present and threatened destruction, modification and curtailment of the fairy shrimp's habitat and range, the inadequacy of existing regulatory mechanisms, and

other natural and man-made factors." Pet. App. C6-C7; see 59 Fed. Reg. at 48,147-48,150. Among the materials that FWS considered in reaching its decision were two studies of the species proposed for listing that had become available during the public comment period. Those two studies were (1) the "Simovich Study," a long-term, multi-disciplinary study of vernal pool species and habitat by the Branchiopod Research Group, led by Dr. Marie Simovich, and (2) the "Sugnet Study," a compilation of the documented distribution of the five shrimp species proposed for listing, prepared by Sugnet and Associates, a consulting firm retained by members of the building industry. 59 Fed. Reg. at 48,140-48,141; see Pet. App. C17-C18.

3. Petitioners filed suit in the United States District Court for the District of Columbia, challenging the FWS's listing decision. Petitioners contended, *inter alia*, that (a) FWS had violated the notice-and-comment requirements of the APA by failing to provide petitioners an opportunity to comment on the Simovich Study before issuing the final rule, and (b) the listing of the fairy shrimp species exceeded the scope of federal regulatory authority conferred by the Commerce Clause. The district court rejected those contentions. See Pet. App. C17-C19, C26-C30.

4. The Court of Appeals for the District of Columbia Circuit affirmed. Pet. App. B1-B10.

a. The court of appeals held that FWS "was not required to publish the Simovich study for public comment." Pet. App. B7. The court stated that "[t]he APA generally obliges an agency to publish for comment the technical studies and data on which it relies." *Ibid.* The court explained, however, that "to avoid perpetual cycles of new notice and comment periods, a final rule that is a logical outgrowth of the

proposal does not require an additional round of notice and comment even if the final rule relies on data submitted during the comment period." *Id.* at B8 (citation and internal quotation marks omitted). The court concluded that "[s]uch is the case here. * * * Essentially, the [proposed rule] advanced for comment a hypothesis and some supporting data. The Simovich study provided additional support for that hypothesis —indeed, better support than was previously available —but it did not reject or modify the hypothesis such that additional comment was necessary." *Ibid.*

b. Petitioners briefly renewed their argument that the listing at issue exceeds Congress's authority under the Commerce Clause. As the court of appeals observed, however, petitioners' brief stated that the Commerce Clause claim "fail[ed] under *National Assoc. of Home Builders* v. *Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), and is asserted only to preserve the possibility of en banc review." Pet. App. B10 (parallel citation omitted). The court of appeals accordingly did not address the merits of petitioners' Commerce Clause claim.

c. Petitioners' petition for rehearing en banc was denied, upon the absence of a request by any member of the court for a vote. Pet. App. A1.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. a. The courts of appeals have uniformly sustained the constitutionality of the prohibition on takings of listed species established by Section 9 of the ESA, 16 U.S.C. 1538. See *Gibbs* v. *Babbitt*, 214 F.3d 483, 489 (4th Cir. 2000) (upholding restrictions on takings of red

wolves), cert. denied, 121 S. Ct. 1081 (2001); *National Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (upholding application of ESA Section 9 to the Delhi Sands Flower-Loving Fly), cert. denied, 524 U.S. 937 (1998). See also *United States* v. *Bramble*, 103 F.3d 1475 (9th Cir. 1996) (upholding the constitutionality of the Bald Eagle Protection Act); *Rancho Viejo, LLC* v. *Norton*, No. Civ. A. 1:00CV02798, 2001 WL 1223502 (D.D.C. Aug. 20, 2001) (upholding the constitutionality of ESA Section 9 to private construction project potentially harmful to the arroyo toad); *GDF Realty Invs., Ltd.* v. *Norton*, 169 F. Supp. 2d 648 (W.D. Tex. 2001) (upholding the application of ESA Section 9 to commercial development potentially harmful to invertebrate cave species in Texas); *Palila* v. *Hawaii Dep't of Land & Natural Res.*, 471 F. Supp. 985 (D. Haw. 1979) (upholding the application of ESA Section 9 to Hawaiian bird species), aff'd, 639 F.2d 495 (9th Cir. 1981). Indeed, to our knowledge no court—either before or after this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995)—has invalidated any federal wildlife legislation as exceeding the reach of Congress's power under the Commerce Clause.[2]

b. Petitioners contend (Pet. 15) that protection of the fairy shrimp species at issue in this case lies beyond the authority of Congress under the Commerce Clause because "the fairy shrimp are a very small, isolated

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[2] In *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995), decided during the same Term and shortly after *Lopez*, this Court held that the Secretary of the Interior had reasonably construed the term "harm," as used in the ESA's definition of "take," to include habitat modification that would kill or injure members of a listed species. No Member of the Court suggested that the ESA, so construed, might exceed Congress's power under the Commerce Clause.

species that have no known commercial use." But while FWS, in listing the fairy shrimp species, did not identify evidence of the species' present commercial use, it did explain that commercial activities posed significant current threats to the species' continued existence. See, *e.g.*, 59 Fed. Reg. at 48,147 ("The habitat of these animals is imperiled by a variety of human-caused activities, primarily urban development, water supply/flood control activities, and conversion of land to agricultural use."). Petitioners established their standing to sue in the district court by "provid[ing] evidence that the listing of the fairy shrimp has depressed their land values and development prospects, has halted or impeded specific developments, and has already cost them thousands of dollars for sampling surveys as well as the costs of delay." Pet. App. C9. The ESA's restrictions on private activities that are likely to harm the fairy shrimp species, in general and as applied to petitioners, therefore have a significant commercial nexus.

In any event, petitioners' demand for proof of a particular species' near-term commercial importance ignores two central (and related) premises of the ESA: that individual species are part of an interdependent web, and that the significance of a particular species cannot always be easily determined at a given point in time. Section 9(a)(1)(B) of the ESA regulates takings of all species that have met the strict criteria for listing by FWS or NMFS as endangered or threatened. 16 U.S.C. 1538(a)(1)(B). "In the aggregate, * * * we can be certain that the extinction of species and the attendant decline in biodiversity will have a real and predictable effect on interstate commerce." *National Ass'n of Home Builders*, 130 F.3d at 1053-1054 (opinion of Wald, J.). A focus on the aggregate commercial significance of all listed species is particularly appropriate in light of

(1) the difficulty of identifying *ex ante* the commercial potential of a particular species, and (2) the fact that extirpation of a species eliminates for all time the possibility of future commercial uses.

In resolving questions concerning the proper construction of the ESA, this Court has recognized Congress's concern "about the *unknown* uses that endangered species might have and about the *unforeseeable* place such creatures may have in the chain of life on this planet." *TVA* v. *Hill*, 437 U.S. 153, 178-179 (1978). The Court in *TVA* v. *Hill* relied on the Act's legislative history, which emphasized the "*incalculable*" value of endangered species as "potential resources" and "keys to puzzles which we cannot solve." *Id.* at 178 (quoting House Report 4-5). Precisely because extinction of an endangered species may have irremediable consequences that cannot readily be foreseen, the few remaining members of the species are appropriately regarded as a valuable national resource. As the Fourth Circuit has observed, "[i]t would be perverse indeed if a species nearing extinction were found to be beyond Congress's power to protect while abundant species were subject to full federal regulatory power." *Gibbs*, 214 F.3d at 498; see also Pet. App. C30.

c. Petitioners contend (Pet. 16) that "the listing of the fairy shrimp substantially intrudes on the sovereign power of the State to control local land use—an area of traditional state concern." That claim is without merit.

"Although States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers." *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999); see *Missouri* v. *Holland*, 252 U.S. 416

(1920) (sustaining Migratory Bird Treaty Act against challenges that it exceeded Congress's powers to implement a duly ratified treaty and infringed on powers reserved to the States under the Tenth Amendment); *Douglas* v. *Seacoast Prods., Inc.*, 431 U.S. 265, 281-282 (1977) (Congress has power under the Commerce Clause to regulate the taking of fish from state waters, thus preempting conflicting state laws). Thus, unlike the federal statutes struck down by this Court in *Lopez* and in *United States* v. *Morrison*, 529 U.S. 598 (2000), the ESA's take prohibition does not "plow[] thoroughly new ground" or "represent[] a sharp break with the long-standing pattern" of federal regulation. *Lopez*, 514 U.S. at 563 (citation omitted). Rather, "[i]n contrast to gender-motivated violence or guns in school yards, the conservation of scarce natural resources is an appropriate and well-recognized area of federal regulation." *Gibbs*, 214 F.3d at 500; see *id.* at 499-501 (discussing history of federal wildlife conservation efforts).

d. Petitioners contend (Pet. 18-21) that review by this Court is warranted because the two judges in the majority in *National Ass'n of Home Builders*, *supra*, relied on different reasoning in concluding that the regulation at issue in that case was a permissible exercise of federal authority under the Commerce Clause. The existence of such disagreement, however, is neither unusual nor a proper basis for invoking this Court's review. The fact that no single rationale commanded a majority in that case, moreover, does not leave private parties in any doubt as to the nature and extent of their legal obligations. The District of Columbia Circuit was under no obligation to establish a "clearer standard" (Pet. 20) than its ultimate determination that the protection of endangered species found only within a single State is a permissible exer-

cise of congressional power under the Commerce Clause.[3]

e. The "final agency action" that is the subject of petitioners' suit is FWS's decision to list four fairy shrimp species as endangered or threatened. See Pet. 7 ("Petitioners filed this suit challenging the listing of the fairy shrimp on various grounds."); Pet. App. C4 (petitioners "challenge the listing of these four species of fairy shrimp"); *id.* at B2 (petitioners "sought review of the [FWS's] listing of various fairy shrimp species as endangered or threatened"). Petitioners have no colorable argument, however, that the listing decision itself was constitutionally infirm. *Inter alia*, FWS's listing of a species as endangered or threatened triggers the provisions of Section 7(a)(2) of the ESA, 16 U.S.C. 1536(a)(2), which requires all federal agencies to "insure" that their actions are "not likely to jeopardize the continued existence of any endangered species or threatened species." Congress has ample authority to protect endangered or threatened species from the activities of the federal government itself, whatever the scope of its power to pursue the same objectives

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[3] Petitioners state (Pet. 11) that "[n]otwithstanding this Court's recent decision in *United States v. Morrison*, the [court of appeals] did not address Petitioners' Commerce Clause challenge on the merits, but deferred to its own insupportable decision in *National Association of Home Builders*." Petitioners were surely at liberty to argue in the court of appeals that *National Ass'n of Home Builders* had been superseded by *Morrison* and therefore was not binding on the panel. Petitioners expressly disavowed such an argument, however, stating instead that their Commerce Clause challenge was "asserted only to preserve the possibility of en banc review." Pet. App. B10 n.8. The panel therefore cannot be faulted for declining to address the merits of the constitutional claim.

through regulation of private conduct on private land. Because petitioners could not under any plausible constitutional theory be entitled to the relief they seek —vacatur of the FWS's listing decision—the instant case provides an unsuitable vehicle for this Court's consideration of the constitutional issues raised in the petition.

2. Petitioners contend (Pet. 21-30) that FWS violated the APA by considering the Simovich Study in its deliberations without providing the public an opportunity to comment upon that study. Petitioners assert (Pet. 25) that the court of appeals' decision on that issue "directly conflicts" with the Ninth Circuit's ruling in *Idaho Farm Bureau Federation* v. *Babbitt*, 58 F.3d 1392 (1995). That claim lacks merit.

The Ninth Circuit in *Idaho Farm Bureau* did not suggest that an agency must provide a second opportunity for public comment whenever it relies on information that it first receives during or after the initial comment period.[4] To the contrary, the Ninth Circuit, relying on District of Columbia Circuit precedent, acknowledged that "[a]n agency may use supplementary data, unavailable during the notice and comment period, that expands on and confirms information contained in the proposed rulemaking and addresses alleged deficiencies in the pre-existing data, so long as

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[4] Any such rule would be unworkable. If agencies were required to reinitiate notice-and-comment procedures under all such circumstances, "the purpose of notice and comment—to allow an agency to reconsider, and sometimes change, its proposal based on the comments of affected persons—would be undermined. Agencies would either refuse to make changes in response to comments or be forced into perpetual cycles of new notice and comment periods." *Association of Battery Recyclers, Inc.* v. *EPA*, 208 F.3d 1047, 1058 (D.C. Cir. 2000); see Pet. App. B8.

no prejudice is shown." 58 F.3d at 1402 (brackets omitted), quoting *Solite Corp.* v. *EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991) (quoting in turn *Community Nutrition Inst.* v. *Block*, 749 F.2d 50, 57-58 (D.C. Cir. 1984) (Scalia, J.)). The court in *Idaho Farm Bureau* found that a new round of notice and comment was required because, *inter alia*, the new scientific study "provided unique information that was not duplicated in other reports." *Id.* at 1403.

In the instant case, the court of appeals, likewise relying on its prior decision in *Solite Corp.*, articulated a comparable legal standard, stating that "a final rule that is a logical outgrowth of the proposal does not require an additional round of notice and comment even if the final rule relies on data submitted during the comment period." Pet. App. B8. The court concluded that "[s]uch is the case here. The Simovich study, while the best available, only confirmed the findings delineated in the proposal." *Ibid.*; see also *id.* at C17-C18 (district court explains that "the conclusion that fairy shrimp are rare within their ranges has other support in the record," and "many experts recommended listing the species without relying on the Simovich Study"). The divergent outcomes in the two cases therefore turned on the roles that the respective studies played in the agency's decisionmaking processes, not on any difference between the legal standards applied by the Ninth and District of Columbia Circuits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2001

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[*] The Solicitor General is recused in this case.